

Housing and Property Chamber First-tier Tribunal for Scotland



First-tier Tribunal for Scotland (Housing and Property Chamber)

Property Factors (Scotland) Act 2011 (“the Act”), section 17

The First-tier Tribunal for Scotland Housing and Property Chamber (Rules of Procedure) Amendment Regulations 2017 (“the 2017 Regulations”)

Chamber Ref: FTS/HPC/PF/17/0262

**Flat 1/1 2 North Street, Paisley, PA3 2BS
 (“the Property”)**

The Parties: -

**Mr Jasbir Singh Gill and Travinder Kaur, 15 Aytoun Road, Glasgow, G41 5RL
 (“the Homeowners”)**

**Ross and Liddell Limited, 60 St Enoch Square, Glasgow, G41 4AW
 (“the Factor”)**

Tribunal Chamber Members

Maurice O’Carroll (Legal Member)
Carol Jones (Ordinary Member)

Decision of the Chamber

The First-tier Tribunal (Housing and Property Chamber) (“the Tribunal”) unanimously determined that the Factor has not failed to comply with the Code of Conduct for Property Factors (“the Code”). It further found that it had not failed to carry out its property factor duties as required by section 17(1)(a) and 17(5) of the Act.

Background

1. By application dated 26 May 2017, Mr Gill applied to the Tribunal for a determination as to whether the Factor had failed to comply with section 5 of the Code as required by section 14(5) of the Act. He also wished to complain that the Factor had failed to comply with various other duties not specifically provided for in the Code in relation to the provision of insurance.
2. The application was subsequently amended to specifically refer to sections 5.6 and 6.9 of the Code and to make specific comments with regard to the provision of block insurance by the Factor. The application was also signed by Travinder Kaur, the joint owner, so that it ran in both names. Both parties are therefore referred to collectively as “the Homeowners” and reference is made to Mr Gill individually where appropriate.

3. Mr Gill intimated concerns regarding the alleged failures in duty on the part of the Factor in compliance with the requirements of section 17(3) of the Act. This he did on 29 May 2017 using a standard template notification letter supplied by the Tribunal. He sent further notifications on 7 June 2017 and on 30 October 2017.
4. By decision dated 1 December 2017, a Convenor on behalf of the President of the Tribunal (Housing and Property Chamber) decided to refer the application to a Tribunal for a hearing.
5. A hearing of the Tribunal was held on 1 February 2018 at Wellington House, Wellington Street, Glasgow. The Homeowners both appeared in person, although only Mr Gill gave evidence on their behalf. The Factor was legally represented by Mr Michael Ritchie of Messrs Hardy Macphail. He was accompanied by the following witnesses, all of whom gave evidence: Mr Brian Fulton, Director of the Factor, Rita Glendinning, Insurance Department Manager and Deborah McGregor, Property Manager responsible for the block in which the Property is situated.

Tribunal findings

The Tribunal made the following general findings in fact pursuant to rule 26(4) of the 2017 Regulations:

6. The Homeowners' complaints within the amended application fall under two main headings: Insurance provision and garden maintenance. Each of these subject-areas will be considered below under the specific findings heading.
7. The Homeowners purchased the Property, which is recorded in the Land Register under Title Number REN62009, in July 1990. They do not live there and let the property out to tenants. They also own other rental properties in the Paisley area which they let out to tenants. At least one of those properties is managed by another factor to which reference was made in the course of evidence.
8. The block consists of six tenement flats and a main door entry flat on the ground floor, giving seven managed properties in total. Renfrewshire Council own four out of the seven flats managed by the Factor. It therefore owns a majority of the properties in the block in which the Homeowners' Property is situated. The Council lets out those four properties to its own tenants.
9. A factor was appointed to the block pursuant to a burden contained in the Disposition by the Trustees of William Storrrie to Ernest Gaynor recorded in the General Register of Sasines applicable to the County of Renfrew on 15 January 1952. This is the first burden in the Title Sheet applicable to the Property and is referred to further below. The Factor has been responsible for property management duties in relation to the block in which the Property is situated at all material times referred to in the application.

10. The Factor has produced a Written Statement of Services as required by the Code. This is referred to as a "Service Level Agreement." The latest version of this, which was produced to the Tribunal, is dated February 2017. It contains specific provisions with regard to insurance cover at part 6.

The Tribunal makes the following specific findings in relation to the areas of complaint raised by the application and letters of notification:

Provision of insurance

11. Section 5.6 of the Code provides that on request, factors must be able to show how and why they appoint insurance providers, including in cases where they have decided not to obtain multiple quotes. The Homeowners cited this section in their amended application and within the notifications sent to the Factor.
12. The Homeowners contended that it was not clear how the insurance contractor for the block was appointed and that therefore section 5.6 of the Code had been breached. Mr Gill also gave evidence that the insurance policy selected by the Factor did not provide good value for money in breach of the Factor's general duty to act in the best interests of the homeowners within the block.
13. Mr Gill was of the view that in order to demonstrate that good value had been obtained, the Factor ought to have obtained several quotes so that the owners of the properties within the block could choose between them. In support of that position, he provided evidence of insurance obtained for another of his rental properties which he said was comparable but was very much cheaper. This, he said, demonstrated that the Factor had not obtained best value for money in obtaining a quote. Further, the Factor received a commission of 22.5% on the insurance premium obtained which is excessive and further underlined his contention that best value for money was not being obtained.
14. It was submitted on behalf of the Factor that section 5.6 of the Code had been complied with. It was explained by Ms Glendinning, who deals with insurance matters on behalf of the Factor, that the Factor uses a broker who investigates all relevant insurers within the market place and obtains the most suitable insurance company to provide cover for the block. This method, which involves selection of an insurance company by the broker, having carried out a comparison of many insurance companies by the brokers who are experts in the field, was explained to the Homeowners in compliance with the Code. Further, this was a system which had not been objected to by the majority of homeowners within the block and it is only the Homeowners who took issue with it.
15. It was further stated that there was no duty on the Factor to obtain multiple quotes for the consideration of homeowners as contended by Mr Gill. The comparator produced by the Homeowners did not compare like with like in that the level of cover provided in each case was different. A lower level of cover was provided in respect of the Paisley property cited by Mr Gill with the consequence the premium was lower. Also, if the owners within the block were to comply with a request from the Factor to provide claims details over the past

five years. the present premium could potentially be reduced from £339 per annum per property to £271.

16. Both parties cited the terms of the Title Deeds in support of their respective positions, so it is worth setting it out in relevant part. Clause (Sixth) of the Disposition mentioned above, establishes the role of the factor and contains the following burden:

“our said dispone and his foresaids as proprietor of the subject hereby dispomed shall be bound to concur with us and our successors as proprietors of the other houses in said tenement in keeping said tenement constantly and adequately insured against loss or damage by fire and that with such Insurance Company or Companies *as such proprietors may select* and the propriators (sic) or proprietor *or the factor* before mentioned who shall pay the insurance premium or premiums shall be entitled to recover from our said disponee and his foresaids a one sixth share of the amount of said premium or premiums:” (italics added).

17. The Homeowners drew the Tribunal’s attention to the phrase emphasised above in italics “as such proprietors may select.” Their position was that they as proprietors had not been permitted to select an insurance company to provide insurance cover for the block as required by the Title Deeds. Had they been so permitted, they would have obtained cover at a much lower premium. This was the basis of the alleged property factor duty to provide several insurance quotes for the common proprietors to choose from in obtaining common insurance for the block. It appeared to the Tribunal that there was considerable force in that interpretation.
18. Incidentally, “such proprietors” refers to the majority of proprietors with the block by rental value. The Tribunal did not have any evidence regarding rental value of the respective properties so followed the parties’ general assumption that the applicable majority was an absolute majority of householders within the block, being four (out of a possible seven). It should also be noted that although the title deeds refer to one sixth shares, the common charges are in fact split seven ways, given that there are seven properties under the common management of the Factor.
19. Mr Ritchie submitted that the reference to “or the factor” meant that there was an alternative to the majority of proprietors, namely selection of the insurer by the Factor itself. The Tribunal disagrees with that interpretation. The word “and” used after the words “may select” appears to be disjunctive as the phrase then goes on to deal with liability for payment and the right to recover the cost of premiums from the disponee.
20. However, looking at matters more widely, legally speaking, the Factor acts as agent for the proprietors within the block. On that wider, more general basis, it appears to be open to the Factor, acting as agent, to select the insurer on behalf of the majority of proprietors. On that basis, it does not matter that the Tribunal was not provided with any evidence that a majority of the homeowners had actively selected the insurer to be provided (as opposed to a failure to

demur, or acquiescence in that selection) given that the insurer in question was indeed selected by the Factor on the advice of its insurance broker. It should be added that this does not appear to accord with the spirit of Clause (sixth). However, the Tribunal reluctantly finds that, legally speaking, this is the correct view. It therefore finds that there has been no breach in the property factor duties in relation to this head of complaint.

21. In relation to the commission received by the Factor, section 5.3 of the Code requires that any commissions received by a factor from an insurance broker is disclosed to homeowners. This is complied with at Section 6(vii) of the WSS which states "We do not charge proprietors a fee for our insurance services. However, we do receive commission from the Insurer, which is utilised for the administration of the policy. Details of commission received will be supplied to you on an annual basis, or upon request." There is no mention of the 22.5% figure within the Factor's WSS.
22. The figure is to be found within productions 8 and 9 which are the Certificate of Block Buildings Insurance and Certificate of Common Buildings Insurance provided by the Zurich Insurance Company for 2017 and 2018 respectively. The certificates are reproduced on Factor letter head with a narration beneath. At the end of each of those documents, the following is stated under the heading "Our Commission": "Our current remuneration from insurers is by way of commission, not fees at 22.50% for all classes of insurance other than Terrorism..."
23. It appeared to the Tribunal that although in compliance with section 5.3 of the Code (which was not in issue), this disclosure lacked candour. A more transparent disclosure might have been made within the WSS itself. Candour is all the more important given that the higher the insurance premium, the higher the commission that will be obtained by the Factor. This potential for conflict of interest would suggest that the greatest standards of candour and transparency should be adopted and applied. This is, however, a matter of recommendation only and does not form part of the present decision.
24. The wording of the insurance section of the WSS appears to have led to a misunderstanding on the part of the Homeowners. At section (iii), an annual charge of £25 is mentioned in relation to "Difference in Conditions". If title deeds allow for owners to arrange their own individual building insurance with other Insurance companies, this clause states that unless their policy extends to specific listed items the Factor will make this charge. If the percentage applied to commission were also mentioned within the body of the WSS, it would be plain to any reader that these were two separate charges in respect of two separate situations.
25. The Tribunal was also concerned in relation to the ambiguous statements contained elsewhere in Section 6 of the WSS. At paragraph (i) it is stated: "Cover and premiums. Where required either by request, Deed of Conditions or Title Deed, we will arrange, via our appointed brokers, a comprehensive common buildings policy on behalf of our proprietors." Deeds of conditions are within property title deeds so it is unnecessary to differentiate these or to

include the former where the latter is mentioned. Separately, the reference to a “request” is confusing in the present context, given that it is the Title Deeds that are the alleged basis of the block insurance policy being arranged by the Factor.

26. It is therefore recommended that the WSS be amended to clarify the insurance section within it to avoid the ambiguities mentioned above, in future. This recommendation does not proceed from a breach of the property factor duties as found by the Tribunal and therefore will not form part of a Property Factor Enforcement Notice.

Pursuing contractors to rectify poor workmanship

27. Section 6.9 of the Code provides that factors must pursue contractors to remedy defects in any inadequate work or service provided.
28. Gardening Services are provided by a company called 1st Class Gardens. Their work is charged monthly during the seven months of the growing season and is charged at £57.14 per month (no VAT charged) which equates to £8.16 per proprietor. That company makes two visits per month plus one at the start and another one at the end of the seven-month period. The company is responsible for pruning back the hedgerow and fir trees bordering the back green and for removing weeds, litter and the moss within the paving slabs there.
29. Mr Gill gave evidence that in spring of 2016 he viewed the back green of the block and noticed that no work had been carried out. He received a regular invoice covering the period up to 15 May 2016 for gardening services. He then revisited the back green in the Autumn of 2016 and made a video recording which showed that no work had been carried out, although it had been paid for. He went to the Factor's office in person and reported the matter to Deborah McGregor. She then arranged for the contractor to return who then carried out the work.
30. Deborah McGregor's evidence broadly mirrored that of Mr Gill. She undertook regular inspections of the block. In November 2016, the homeowner came to the Factor's office to complain that works to the back green had not been carried out. She contacted Mr Alex Donoghue of 1st Class Gardens who agreed that work had not been completed to the required standard, although he had been out to the property. He apologised to her and returned to the block and carried out the work required. He did this soon after the complaint was made and the work was completed at no extra cost to the homeowners.
31. In the circumstances as spoken to by both parties, it was clear to the Tribunal that there had been no breach of section 6.9 of the Code: work was not carried out properly by a contractor but once the matter was brought to the Factor's attention, it pursued the contractor and the failure was remedied swiftly and at no further cost to the homeowners. No breach of property factor duties arising other than from the Code was alleged.

Decision

32. The Tribunal finds that the Factor has not breached its duty to comply with the Code or failed to comply with the property factor duties in terms of section 17 of the Act. The Tribunal has, however, made a recommendation as set out above in relation to the section of the WSS dealing with the provision of insurance services.

Appeals

33. In terms of section 46 of the Tribunals (Scotland) Act 2014, a party aggrieved by the decision of the Tribunal may appeal to the Upper Tribunal for Scotland on a point of law only. Before an appeal can be made to the Upper Tribunal, the party must first seek permission to appeal from the First-tier Tribunal. That party must seek permission within 30 days of the date the decision was sent to them. M O'Carroll

Signed: M O'Carroll
Chairman

Date: 6 February 2018